Filed 10/25/16 P. v. Mendoza CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANK SOLANO MENDOZA,

Defendant and Appellant.

F070621

(Kern Super. Ct. No. SC078061A)

OPINION

THE COURT[*]

APPEAL from an order of the Superior Court of Kern County. Michael G. Bush, Judge.

Carlo Andreani, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Carlos A. Martinez, Supervising Deputy Attorney General, Catherine Tennant Nieto, Deputy Attorney General, for Plaintiff and Respondent.

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[*] Before Gomes, Acting P.J., Kane, J. and Smith, J.

Appellant Frank Solano Mendoza appeals from the order denying his petition for recall of sentence pursuant to Penal Code section 1170.126.[1] Appellant contends the trial court wrongly concluded a prior conviction rendered him ineligible for resentencing and that the trial court's process in reaching that decision violated his Sixth Amendment right to represent himself. For the reasons set forth below, we reverse and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

On or around February 25, 2013, appellant filed a petition for recall of sentence pursuant to section 1170.126. Appellant alleged he had been sentenced in 1999 to an indeterminate term of life imprisonment pursuant to section 667 for a violation of Health and Safety Code section 11377, subdivision (a). Appellant further alleged he had "no prior convictions for any of the offenses appearing in Section 667(e)(2)(C)(iv) and/or Section 1170.12(c)(2)(C)(iv), as amended by the Three Strikes Reform Act of 2012."

Appellant attached the abstract of judgment from his 1999 conviction along with the minute order from his sentencing. He also attached the abstract and minute order following a 2002 amended sentencing procedure and a set of documents detailing the awards and commendations he had received for good behavior while incarcerated. Although these records showed six potential prior convictions, appellant's petition alleged his prior convictions were limited to a prior youth commitment and an attempted robbery.

Also submitted with the petition was a waiver of personal appearance. In this document, appellant requested the court proceed in his absence when permitted and agreed that in such instances "his interest is represented at all times by the presence of his attorney or the Public Defender the same as if the Petitioner were personally present in

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[1] All statutory references are to the Penal Code unless otherwise noted.

court." There is no indication, however, that appellant was represented by counsel or the public defender at the time he filed his petition.

On March 14, 2013, the superior court sent a letter to appellant informing him that his petition had been received and "forwarded to the Kern County Public Defender's Office for review and further processing." On November 4, 2014, the public defender's office sent a memorandum to the superior court, stating: "The Public Defender informed Mr. Mendoza that the Public Defender believes he is ineligible. Mr. Mendoza's [sic] has a prior conviction for California Penal Code section 261.3 [sic]. California Penal Code section 667(e)(2)(C)(iv) prohibits re-sentencing for inmates who have a prior conviction sexually [sic] violent offenses pursuant to Welfare and Institutions code section 6600(b). The elements of section 261.3 [sic] brings [sic] the charge squarely within the meaning of Welfare and Institutions code section 6600(b)."

On November 10, 2014, the trial court denied appellant's petition. Acting "without the physical case file," the court concluded appellant was "not eligible for resentencing under Prop 36 based on the nature of one of [appellant's] strike priors." In the ruling sent to appellant, the court explained: "Pursuant to the Kern County Superior Court procedure for these requests, the court referred [appellant's] request to the Kern County Public Defender. The Public Defender determined [appellant] was not eligible for resentencing based on one of [appellant's] prior convictions and so informed [appellant]. The Public Defender has returned the request to the court for further review to determine if the [appellant] is eligible. [¶] This court finds the [appellant] is not eligible for resentencing under Proposition 36 based on the nature of one of his strike priors."

This appeal timely followed.

DISCUSSION

Standard of Review and Applicable Law

" 'On November 6, 2012, the voters approved Proposition 36, the Three Strikes Reform Act of 2012, which amended [Penal Code] sections 667 and 1170.12 and added [Penal Code] section 1170.126 (hereafter the Act). . . . The Act . . . created a postconviction release proceeding whereby a prisoner who is serving an indeterminate life sentence imposed pursuant to the three strikes law for a crime that is not a serious or violent felony and who is not disqualified, may have his or her sentence recalled and be sentenced as a second strike offender unless the court determines that resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.126.)' " (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1026, fn. omitted (*Osuna*).)

To qualify for resentencing, a petitioner must satisfy three criteria. (§ 1170.126, subd. (e)(1)-(3).) Pertinent to this appeal, to be eligible the petitioner must have "no prior convictions for any of the offenses appearing in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clause (iv) of subparagraph (C) of paragraph (2) of subdivision (c) of section 1170.12." (§ 1170.126, subd. (e)(3).) Clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of section 667 identifies as a disqualifying offense any prior conviction for "[a] 'sexually violent offense' as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code," among others. (§ 667, subd. (e)(2)(C)(iv)(I).) Welfare and Institutions Code section 6600, in turn, identifies a sexually violent offense as any one of the following categories of enumerated offenses "when committed by force, violence, duress, menace, fear of immediate and unlawful bodily injury on the victim or another person, or threatening to retaliate in the future against the victim or any other person:" (1) "a felony violation of Section 261, 262, 264.1, 269, 286, 288, 288a, 288.5, or 289 of the Penal Code" or (2) "any felony violation of Section 207, 209, or 220 of the Penal Code, committed with the intent to

commit a violation of Section 261, 262, 264.1, 286, 288, 288a, or 289 of the Penal Code." (Welf. & Inst. Code, § 6600, subd. (b).)

The trial court is tasked with determining whether a petitioner is eligible for resentencing. (§ 1170.126, subd. (f).) "[A] trial court need only find the existence of a disqualifying factor by a preponderance of the evidence." (*Osuna*, *supra*, 225 Cal.App.4th at p. 1040.)

As the trial court's eligibility determination is factual in nature, we review that determination for substantial evidence. (*People v. Hicks* (2014) 231 Cal.App.4th 275, 286; *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1331 (*Bradford*); see also *People v. Woodell* (1998) 17 Cal.4th 448, 461 [in determining whether prior offense was qualifying for three strikes review, "a reasonable trier of fact could find beyond a reasonable doubt that the North Carolina trial court impliedly found that defendant was convicted of the assault because of his personal use of a deadly weapon, and not because of vicarious liability for weapon use by some third party."].)

Substantial Evidence Does Not Support the Trial Court's Ruling

As an initial matter, appellant's petition, as filed, appears to demonstrate he is eligible for resentencing under Proposition 36. Despite this fact, and the fact that no additional original documents concerning appellant's prior convictions were introduced into the trial court record (either by submission, incorporation, or judicial notice), appellant's petition was denied on the assertion that one of his prior convictions qualified as a sexually violent offense. Appellant, relying on *People v. Manning* (2014) 226 Cal.App.4th 1133, 1144 (*Manning*) alleges that the record is insufficient to determine which prior conviction the superior court relied upon to deny his petition and whether or not that petition properly qualified as a sexually violent offense. We agree.

The limited record on appeal leaves substantial questions regarding why the court denied appellant's petition. With no additional documentation introduced on appellant's prior convictions, the record appears to show that the court's decision was based

exclusively on the assertion from the public defender that appellant had suffered a prior invalidating conviction. However, the letter from the public defender, even if accepted as credible evidence, could not support such a conclusion.

As the People recognize, the Penal Code section cited for appellant's prior conviction does not exist. At best, an educated guess is required to determine what provision that conviction could have been under. However, as *Manning* demonstrates, even if we assume the conviction was under Penal Code section 261, for which there is no direct evidence in the record, certain convictions under that statute do not qualify as sexually violent offenses. (*Manning*, *supra*, 226 Cal.App.4th at p. 1140 ["Manning rightly notes a violation of section 261, subdivision (a)(4), does not necessarily involve the elements of either an underage victim or force, violence, duress, etc."].) Moreover, even if we accepted the People's unsupported assumption that the letter's reference to section "261.3" means a conviction under former section 261, subdivision (3), we still are left without clear facts showing the conduct covered qualifies under the statutory definition for a sexually violent offense. (*People v. Hubbart* (2001) 88 Cal.App.4th 1202, 1210, fn. 1 ["Former Penal Code section 261, subdivision 3 included both forcible rape and rape accomplished because the victim was under the influence of a controlled substance."].) Given this lack of evidence we "cannot be sure what materials the trial court considered before denying" appellant's petition, "or what the trial court's precise reason was for finding" appellant ineligible. (*Manning*, *supra*, 226 Cal.App.4th at p. 1144.) Accordingly, we cannot conclude that substantial evidence supports the trial court's determination. The case must, therefore, be remanded for a proper determination regarding appellant's eligibility.

Having concluded the trial court's decision must be reversed, we need not reach whether appellant's Sixth Amendment rights were violated when the court transferred his

petition to the public defender for further analysis.[2] Upon remand, appellant will have the opportunity to raise any remaining concerns regarding the appointment or non-appointment of counsel. However, while section 1170.126, subdivision (f) states the court "shall determine whether the petitioner satisfies the criteria" for resentencing, we note that referring this process to the public defender may lead to unnecessary potential conflicts where, as here, the public defender has taken a position contrary to a potential future client's interests and its initial analysis contains flaws which could render it incorrect. (See *Rouse, supra*, 245 Cal.App.4th at pp. 300-301 [finding right to counsel attaches at the resentencing stage under Proposition 47]; see also *Bradford, supra*, 227 Cal.App.4th at p. 1341 ["But if the petitioner has not addressed the issue and the matter of eligibility concerns facts that were not actually adjudicated at the time of the petitioner's original conviction (as here), the trial court should invite further briefing by the parties before finding the petitioner ineligible for resentencing."].)

DISPOSITION

The order is reversed and this matter is remanded for further proceedings consistent with this opinion.

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[2] Regardless, the People are not correct in asserting appellant's personal appearance waiver authorized the public defender to proceed as appellant's counsel. The terms of the agreement contemplate either the presence of an attorney or the public defender in appellant's place at hearings and, thus, cannot be read to limit appellant's choice of counsel to only the public defender. (See also *People v. Rouse* (2016) 245 Cal.App.4th 292, 300 (*Rouse*) ["We recognize that defendant waived his right to personally appear at the resentencing hearing, but defendant's waiver of his right to be present did not constitute a waiver of his *separate* right to counsel."].)